

Original

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the matter of )  
 )  
Application by SBC Communications, Inc. )  
For Authorization Under Section 271 of the )  
Communications Act To Provide In-Region )  
InterLATA Service in the State of Oklahoma )  
\_\_\_\_\_ )

CC Docket  
No. 97-121

DOCKET FILE COPY ORIGINAL  
RECEIVED  
MAY - 1 1997  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

COMMENTS OF AT&T IN OPPOSITION TO  
SBC'S SECTION 271 APPLICATION FOR OKLAHOMA

Mark C. Rosenblum  
Leonard J. Cali  
Roy E. Hoffinger  
Jodie Donovan-May  
AT&T Corporation  
295 North Maple Avenue  
Basking Ridge, New Jersey 07920  
(908) 221-3539

David W. Carpenter  
Mark E. Haddad  
Dale E. Thomas  
Peter D. Keisler  
Ronald S. Flag  
Sidley & Austin  
1722 Eye Street, N.W.  
Washington, D.C. 20006  
(202) 736-8000

Thomas C. Peltó  
Michelle S. Bourianoff  
AT&T Communications of  
the Southwest, Inc.  
919 Congress Avenue, Suite 1500  
Austin, Texas 78759  
(512) 370-2010

Counsel for AT&T Corp. and  
AT&T Communications of the Southwest, Inc.

May 1, 1997

No. of Copies rec'd  
List A B C D E

047

## **TABLE OF CONTENTS**

<b>INTRODUCTION</b>	<b>1</b>
<b>I. SBC HAS NOT SATISFIED THE REQUIREMENTS OF TRACK A</b>	<b>5</b>
A. SBC Has Not Demonstrated The Presence Of A Competing Facilities-Based Provider	6
B. SBC Is Not "Providing" Each Of The Checklist Items	10
<b>II. SBC MAY NOT RESORT TO TRACK B</b>	<b>16</b>
<b>III. SBC HAS NEITHER FULLY IMPLEMENTED THE COMPETITIVE CHECKLIST NOR MADE EACH ITEM GENERALLY AVAILABLE</b>	<b>20</b>
A. SBC Is Not Providing Or Offering Nondiscriminatory Access To Its Network Elements	21
1. Design Services	22
2. Licensing	23
3. Restrictions on Unbundled Switching	24
4. Restrictions on Unbundled Loops and Transport	26
B. SBC Is Neither Providing Nor Offering Access and Interconnection At Cost-Based Rates In Accordance With Sections 251 and 252	26
C. SBC Is Neither Providing Nor Offering Nondiscriminatory Access To Its Operations Support Systems	28
1. UNE-Platform	29
2. Resale	30
3. Nondiscriminatory Performance	32
D. SBC Is Not Providing Or Offering Unrestricted Resale	33
E. SBC Is Not Providing Or Offering Interim Number Portability	33

F.	SBC Has Not Met Numerous Other Checklist Obligations . . . . .	34
IV.	SBC HAS NOT DEMONSTRATED THAT IT WILL CARRY OUT INTERLATA AUTHORIZATION IN ACCORDANCE WITH SECTION 272 . . . . .	35
V.	SBC CANNOT SHOW THAT ITS ENTRY INTO THE INTEREXCHANGE MARKET AT THIS TIME WOULD BE CONSISTENT WITH THE PUBLIC INTEREST, CONVENIENCE, AND NECESSITY . . . . .	37
A.	The State Of Local Competition Must Be Examined When Making The Public Interest Determination . . . . .	38
B.	The Absence of Competition in Oklahoma Local Exchange Markets Demonstrates That SBC's Entry Into The Interexchange Market Would Be Inconsistent With the Public Interest, Convenience, And Necessity . . . . .	40
1.	There is No Effective Competition in The Local Exchange Market . . . . .	40
2.	SBC's Premature Entry Into The Interexchange Market Would Provide SBC Incentive And Opportunity To Harm Competition . . . . .	42
C.	Because The Interexchange Market Is Already Vigorously Competitive, SBC's Claims of Likely Consumer Benefits From Its Entry Are Baseless . . . . .	44
	CONCLUSION . . . . .	50

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the matter of	)	
	)	
Application by SBC Communications, Inc.	)	CC Docket
For Authorization Under Section 271 of the	)	No. 97-121
Communications Act To Provide In-Region	)	
InterLATA Service in the State of Oklahoma	)	
_____	)	

**COMMENTS OF AT&T IN OPPOSITION TO  
SBC'S SECTION 271 APPLICATION FOR OKLAHOMA**

AT&T Corp. and AT&T Communications of the Southwest, Inc., ("AT&T") respectfully submit this opposition to the application of SBC Communications, Inc., et al. ("SBC") for authorization to provide interLATA services originating in Oklahoma.

**INTRODUCTION**

Strict enforcement of the requirements of Section 271 is crucial to the success of the Telecommunications Act of 1996. It would defeat the Act's central purposes if a BOC were authorized to offer long distance service before there are or could immediately be competitively significant alternatives to the BOC's local services throughout that BOC's state. Most fundamentally, such a premature authorization would eliminate the BOC's "powerful incentive" to cooperate with potential competitors and actually implement the necessary preconditions to meaningful local competition.<sup>1</sup> This, in turn, would indefinitely delay, and perhaps foreclose altogether, the local competition that is the primary object of the Act. At the same time, such a premature authorization would enable the BOC to monopolize major segments of the provision

---

<sup>1</sup> In the Matter of Petition for Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona, DA97-767, ¶¶ 25, 28 (Rel. April 21, 1997).

of interLATA services in that state.

In seeking interLATA authorization for Oklahoma, SBC has not merely filed an application that is obviously premature under the statutory standards. SBC has urged the adoption of legal theories that would reward the BOCs for their success in frustrating new local service entrants and that are an affront to the Act's terms, purposes, and structure. In particular, SBC has systematically prevented the emergence of competitively significant competition in Oklahoma by failing to implement the competitive checklist and by placing numerous roadblocks in the paths of potential entrants. Yet it now claims that the absence of meaningful competition should entitle it to interLATA authorization if it "promises" to comply with Section 251 in the future.

Under the plain terms of Section 271, however, the Commission's analysis of SBC's application can begin and end with an examination of competitive conditions in Oklahoma. Numerous potential competitors are investing hundreds of millions of dollars in an effort to provide significant local service alternatives in that state. But to date, these efforts have not borne fruit. There is now one carrier besides SBC -- Brooks Fiber -- that provides local telephone service in SBC's territory in Oklahoma. Yet Brooks Fiber serves a total of 20 business customers and does so only partially through its own facilities (many of which pre-date the Act). Further, Brooks offers no residential service, but is only now testing resold service with four of its employees. The other potential entrants are still struggling to conclude interconnection agreements with SBC that comply with Sections 251(b) and (c) and that would, only when later fully implemented by SBC, allow these carriers to provide widespread and competitively significant alternatives to SBC's monopoly.

These facts foreclose interLATA authorization under any possible interpretation of Section 271. Indeed, SBC's application consists not of any substantial evidence of SBC's compliance with the competitive checklist and Section 271's other strict requirements, but of a series of extreme and untenable proposed interpretations of the Act. For example, although the plain language of Section 271 requires that a BOC show that it "is providing" "each" checklist item, SBC admits that it is not actually "providing" most of the checklist items (SBC Br. 16-17), and the record shows that SBC could not provide them now even if it were determined to do so. But SBC asserts that it has satisfied the "is providing" element of Track A by making the startling claim that it is sufficient for a BOC simply to promise to provide all items at some unspecified date in the future. Id. 16.

Track A also requires proof of the presence of an "unaffiliated competing provider" that serves residential and business customers at least predominantly over its own facilities. Because SBC cannot meet this requirement, SBC makes the untenable claim that a BOC meets this requirement by showing that there is a carrier who uses preexisting facilities and tariffed BOC services (not unbundled network elements) to serve one business customer and who allegedly could also thus serve residential customers in the future (but is not doing so). Id. 10-12.

And SBC's spurious arguments under Track A are ultimately mere window dressing to the even more extreme and untenable claims that SBC advances under Track B. Indeed, the real agenda of SBC's application is to propose an "interpretation" of Section 271 in which BOCs can evade Track A's requirements altogether and obtain interLATA authorization under Track B, despite (indeed, because of) the conceded absence of local competition. In particular, because it is clear SBC cannot yet meet the requirements of Track A, SBC claims that it is entitled to

proceed under Track B as if no carrier had requested access and interconnection in the first place and to rely solely on unproven and unfulfilled promises contained in a Statement of Generally Available Terms and Conditions ("SGAT") that has taken effect. Id. 12-15.

Track B is today unavailable as to SBC in Oklahoma, however, because it is undisputed that numerous potential competitors long ago requested and have diligently pursued access and interconnection under Section 251 in this state. Indeed, there would be statewide competition in Oklahoma today if SBC had previously fulfilled its obligation to provide new entrants with combinations of network elements under rates, terms, and conditions that are cost-based and nondiscriminatory. These facts preclude resort to Track B as a matter of law.

For these reasons, SBC's application under Track B would be defective even if SBC had shown that its SGAT satisfies the competitive checklist of Section 271(c)(2). But it has not. The SGAT is defective on its face for numerous reasons. First, it imposes blatantly discriminatory restrictions on the use of unbundled network elements that violate the Act and the Commission's interpretive rules. For example, the SGAT degrades the elements that are provided and imposes discriminatorily higher costs on new entrants by refusing to provide unbundled elements except with restrictions that SBC labels "design services." The SGAT further unlawfully prohibits the use of unbundled elements to provide certain services and unlawfully imposes the very licensing requirements on new entrants that SBC proposed, and the Commission expressly rejected, in its Infrastructure Sharing Order. Second, the SGAT contains rates for network elements that have never been found to satisfy the requirements of cost-based rates of Sections 251(c) and 252(d), and SBC does not even attempt to meet its burden of making the necessary showing here.

Finally, nondiscriminatory electronic access to SBC's operations support systems is not generally available for unbundled elements or resale. SBC's resale interfaces have yet to be tested, let alone used, by CLECs, and SBC has not even provided the specifications that CLECs need in order to design systems to order combinations of unbundled elements.

These and other failures by SBC illustrate why local competition has yet to emerge in Oklahoma. Such competition will develop, if at all, only when SBC is compelled to meet its obligations genuinely to cooperate with its potential rivals and to provide nondiscriminatory access and interconnection in accordance with Section 251's requirements.

Because SBC's application depends so heavily on extreme legal claims, this brief will begin with a discussion of the requirements of Section 271. Part I will demonstrate why SBC has not satisfied the requirements of Track A. Part II will explain why SBC could not invoke Track B even if its SGAT fully complied with the statutory requirements. Part III will address the deficiencies in SBC's checklist compliance regardless of which Track is invoked. Part IV will describe SBC's failure to demonstrate compliance with Section 272. Finally, Part V will respond to SBC's extreme claims concerning the public interest.

## **I. SBC HAS NOT SATISFIED THE REQUIREMENTS OF TRACK A.**

Section 271 requires that a BOC's application for interLATA authority satisfy the requirements of "Track A" (§ 271(c)(1)(A), (c)(2)(A)(i)(I), (c)(2)(B), (d)(3)(A)(i)) whenever CLECs have timely made and pursued requests for interconnection. Track A has two principal requirements. First, the BOC must show the presence in its market of "one or more unaffiliated competing providers of telephone exchange service . . . to residential and business subscribers" using "exclusively" or "predominantly" their "own telephone exchange service facilities."



§ 271(c)(1)(A). Second, the BOC must show that it "is providing," on nondiscriminatory terms and conditions, "each" of the 14 items on the competitive checklist. §§ 271(c)(2)(A)(i)(I), (c)(2)(B), & (d)(3). SBC's application satisfies neither of these requirements.

**A. SBC Has Not Demonstrated The Presence Of A Competing Facilities-Based Provider.**

First, no carrier in Oklahoma (other than SBC) is currently using its own facilities to provide local telephone service to "residential" customers. § 271(c)(1)(A). SBC exclusively relies on Brooks Fiber, but Brooks does not offer residential service to the public. Rather, it has done no more than test the provision of such service (on a pure resale basis) to four of its employees. Initial Comments of Brooks Fiber (reprinted at SBC App. IV Tab 23) at 2. Indeed, Brooks has now submitted testimony confirming that it is "not now offering residential service in Oklahoma, nor has it ever offered residential service in Oklahoma." ALTS Motion to Dismiss, Shapleigh Aff. ¶ 3. For this reason alone, under Track A, SBC's application must be rejected.

Second, and more fundamentally, SBC has failed to show that it faces a facilities-based competitor of any sort. The basic purpose of the facilities-based competitor requirement is to provide tangible evidence that the competitive checklist truly has been fully implemented and that the statute is working, as Congress intended, to open local markets to meaningful competition. As was explained by the House Report, the requirement of a facilities-based competing provider "is the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed open to competition. In the Committee's view, the openness and accessibility

requirements are truly validated only when an entity offers a competitive local service in reliance on those requirements."<sup>2</sup>

There is no such facilities-based competition in Oklahoma. Notably, Brooks specifically alleges that it would prefer to serve customers using unbundled loops, but that it has been unable to obtain unbundled loops on reasonable terms and conditions from SBC. Initial Comments of Brooks Fiber at 2-4. Moreover, SBC has mounted a determined campaign, from the very outset of negotiations with AT&T, to resist AT&T's requests for access to unbundled elements in general, and in particular to block access to a combination of unbundled elements (the "platform") that would enable AT&T to provide competitively significant alternatives to SBC's local exchange services throughout Oklahoma. Wren Aff. ¶¶ 17-50. This record of non-competition not only cannot serve as a "tangible affirmation" of SBC's implementation of the checklist, it affirmatively disproves it.

As a result, all that SBC can point to is a competitive access provider, Brooks Fiber, that had built its existing transmission facilities before the Act was passed, and that now provides exchange service to most of its 20 business customers predominantly by using SBC's tariffed services in combination with Brooks's facilities. Of Brooks's 20 total customers, only eight are served exclusively over Brooks's own facilities; the rest are served either through resale or through an arrangement involving "leased SBC dedicated T-1 facilities" that "requires deployment of special network equipment by Brooks and is only economically feasible for providing service to certain customers." Initial Comments of Brooks Fiber at 3 n.4.

---

<sup>2</sup> H.R. Rep. No. 204, 104th Cong. 1st Sess., 76-77 (1995); see H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess., 147-48 (1996) (facilities-based competitor requirement adopted "virtually verbatim" from House bill) (cited hereinafter as "Conf. Rep.").

SBC's arguments that Brooks Fiber is a predominantly facilities-based carrier under subparagraph (A) turn chiefly on legislative history, which SBC misrepresents, and which in any event conflicts with the language and purpose of the statute. Specifically, SBC claims that Congress voted to reject amendments to the Act that would have prescribed a "minimum number of customers" as a "metric" test of competition. SBC Br. 9. On this basis, SBC claims that service even to one business and one residential customer would satisfy the facilities-based competitor requirement. Id.

Congress did not vote down any "metric" amendments to the facilities-based provider requirement that became law, however, nor would any such votes have had the significance that SBC ascribes to them.<sup>3</sup> The language of section 271(c)(1)(A) plainly reveals Congress's intent to require meaningful competition -- competition sufficient to put pressure on the incumbent and to demonstrate that the checklist was working -- and any further language thus would have been superfluous.

Subparagraph (c)(1)(A) requires proof not simply of an "unaffiliated provider" of telephone exchange service, but of an "unaffiliated competing provider." SBC's construction treats the word "competing" as mere surplusage, for under that construction it would have been

---

<sup>3</sup> SBC's reliance (see SBC Br. 9, 10) on Senator Pressler's statements about the Senate Bill, S. 652, and on the rejection of an amendment to S. 652 proposed by Senator Kerrey, is misplaced, because S. 652 did not include any requirement that there be a facilities-based competitor providing service to residential and business customers -- the Conference Agreement adopted this requirement from the House Bill. Worse still, SBC asserts that Congress rejected Congressman Bunn's amendment even though this amendment in fact was "ruled out of order to protect the manager's amendment" and never voted on. 141 Cong. Rec. H8454 (daily ed. Aug. 4, 1995) (statement of Rep. Bunn). Finally, SBC omits any reference to the examples in the Conference Report of the "meaningful" competition that "consistently has been contemplated." Conf. Rep. p. 148.

sufficient for the Act simply to require one or more "unaffiliated providers" of exchange service. The addition of the term "competing" indicates that the unaffiliated provider must truly be a competitor, that is, a carrier with a market presence sufficient to impose competitive pressure on the BOC. By any measure, Brooks cannot qualify as a competitor, because it serves only 20 business customers and does not offer service to residential customers.

These points are confirmed by the third sentence of subparagraph (c)(1)(A). There, Congress specified that the presence of providers of cellular service and of exchange access was not to be considered "[f]or the purpose of this subparagraph." § 271(c)(1)(A). Congress also determined that resale is inadequate for these purposes. The fact that Congress expressly excluded consideration of alternative providers of local exchange service that imposed no market discipline on the BOC starkly confirms that Congress intended the facilities-based competitor requirement to be a meaningful one.

SBC also claims that a carrier, such as Brooks, is facilities-based even through it serves more than half of its customers over loops that are "leased" only as a tariffed service from a BOC. SBC Br. 11-12. But there is no basis for treating services or facilities obtained at tariffed rates as a carrier's "own facilities" for purposes of Section 271(c)(1)(A).<sup>4</sup> That is especially so where, as here, the CLEC prefers to use unbundled loops that are obtained at the cost-based rates and other terms and conditions required by Section 251(c), but has been denied them by SBC.

---

<sup>4</sup> A CLEC is predominantly facilities-based only if it is using predominantly its own facilities with respect to each of the network elements -- loops, switching, and transport -- identified by SBC. This is particularly true of loops, because the potential for discrimination in loop-provisioning is substantial and thus the need for independence from the BOC is essential. See Allen/Gropper Aff. ¶¶ 33-35; Falcone/Turner ¶¶ 61-63.

It is thus ironic that SBC would here claim that unbundled network elements leased from a BOC count as a CLEC's own facilities. SBC Br. 11-12. There is no basis for the Commission here to consider whether or when unbundled network elements that are obtained at their economic cost and on the same terms as SBC enjoys could ever be equivalent to a CLEC's own facilities for the purpose of subparagraph (c)(1)(A). SBC has failed to satisfy the requirements of the Act and the Commission's rules that it provide the unbundled network elements on these terms. Indeed, quite apart from the fact that the only unaffiliated provider currently in the market has been denied the unbundled elements that would allow it best to expand its service, AT&T and other competitors are actively seeking to enter the market on a far greater scale than Brooks Fiber by initially using the combinations of unbundled network elements that SBC is required to provide, but has failed to offer. Wren Aff. ¶¶ 9-15. The simple reality is that SBC today does not face one or more statewide predominantly facilities-based competitors -- even as it defines that term -- because SBC has failed to provide competitors with the unbundled elements and other checklist items they need to compete.

**B. SBC Is Not "Providing" Each Of The Checklist Items.**

In addition to requiring the presence of one or more predominantly facilities-based competitors, Track A requires proof that the BOC "is providing" access and interconnection that includes "each" of the checklist items (§ 271(c)(2)(A) & (B)), and that it "has fully implemented the competitive checklist." § 271(d)(3)(A)(i). SBC has not met this requirement. By its own admission, SBC is unable to show that it is providing numerous checklist items in any fashion whatsoever to any CLECs today, let alone that the entire checklist has been fully implemented. SBC Br. 15-17. For example, SBC has yet to provide any CLEC with such crucial checklist

items as unbundled loops, unbundled switching, or nondiscriminatory electronic access to operations support systems. The full extent of SBC's failure to implement the competitive checklist is discussed in Part III, *infra*, and in the accompanying affidavits. But for purposes of SBC's reliance upon Track A, SBC's acknowledged failure to provide each item is an independent reason to reject the application.

Because it cannot yet meet the plain terms of the statute, SBC tries to twist the meaning of the words. Although the term "provide" is contrasted to the terms "offer" and "make available" throughout Section 271, SBC claims that these terms should nevertheless be understood as synonymous. SBC Br. 16. SBC's conflation of "provide" and "offer/make available" ignores, however, that the statute contrasts these terms in each of three separate provisions of Section 271 that differentiate "Track A" from "Track B." Thus, SBC's construction would obliterate the principal distinction between Track A and Track B.

First, the two subparagraphs of subsection (c)(1) establish two sets of requirements for interLATA authorization, one requiring proof that there are one or more unaffiliated, competing, facilities-based "providers" of service (subparagraph (A)), and the other requiring an approved or effective statement of "generally available" terms (subparagraph (B)). Second, subsection (c)(2) carries forward this distinction by distinguishing between the obligation of a BOC under subparagraph (1)(A) to be "providing" each element and the obligation under subparagraph (1)(B) to be "generally offering" each element. Finally, subsection (d)(3)(A) again refers to and preserves the distinction between the BOC's obligation to "provide" each checklist item "pursuant to subsection (c)(1)(A)" as opposed to its obligation to "generally offer[]" them under "subsection (c)(1)(B)." § 271(d)(3)(A).

Congress's contrasting use of "provide" and "offer/make available" throughout Section 271 is no coincidence. It reflects the fundamental structural difference between Track A and Track B. Track B is an avenue for obtaining interLATA authority that a BOC may pursue in the event that the BOC is unable, through no fault of its own, to meet the "is providing" standard of Track A. This could happen in any of the three circumstances identified in subparagraph (c)(1)(B). Track B is triggered in the first instance if CLECs fail to make a timely "request" for an access and interconnection agreement. Absent any such request, it is obvious that the BOC could not actually provide such access and interconnection to any CLEC. For that reason, the inquiry under Track B is whether the BOC "is generally offering access and interconnection" that encompasses each of the checklist items (§ (c)(2)(A)(i)(II)) pursuant to a statement of "generally available" terms and conditions as described in Section 252(f).

As both the Georgia and Wisconsin state commissions have concluded, a BOC that is not capable of actually furnishing a particular checklist item in a timely and nondiscriminatory manner upon request cannot be found to be "generally offering" that item as required under the statute.<sup>5</sup> Thus, the critical difference between Track A and Track B is that under Track A the BOC must actually be providing each of the elements in a timely and nondiscriminatory fashion, whereas under Track B the BOC is excused from having actually to provide an element that has not yet been requested, but must nevertheless prove that it could do so if asked.

This is further evident from the two subsections of subparagraph (B) that create exceptions to Track A and that would allow a BOC to proceed under Track B. First, Track B

---

<sup>5</sup> See *In re BellSouth Telecommunications Inc. Statement of Generally Available Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996*, Docket No. 7253-U, p. 8 (Ga PSC Mar. 20, 1997); Wisconsin Utility Reg. Rep. (Apr. 3, 1997) pp. 3-5.

is triggered if CLECs, having made requests for an access and interconnection agreement, then "failed to negotiate in good faith." § 271 (c)(1)(B)(i). This exception makes sense because, in the absence of good faith negotiations, a BOC again would lack the opportunity actually to provide access and interconnection as required by the statute.

Similarly, Track B is available in the event that CLECs, having negotiated agreements with the BOC, "fail[] to comply, within a reasonable period of time, with the implementation schedule contained in such agreement." § 271(c)(1)(B)(ii). Thus, in the event CLECs have negotiated agreements to obtain all of the checklist items, but subsequently fail within a reasonable period of time to comply with their implementation schedules through no fault of the BOC, then the BOC once again may seek relief under Track B from the "providing" requirement.

The need for these two additional routes to Track B simply disappears if the term "provide" is interpreted to mean "offer" or "make available." For example, there would be no need for the two subsections of subparagraph (B), because the issues of whether the CLEC had negotiated for various items in good faith or implemented its agreement within a reasonable period of time would make no difference at all to the BOC's ability to meet Track A. The fact that the BOC had "offered" to provide the items, by SBC's hypothesis, would be sufficient to demonstrate compliance under Track A regardless of a CLEC's performance. Indeed, there would have been no need at all for a Track B separate from Track A. Congress would have simply required BOCs to offer the checklist items via an SGAT for purposes of Track A, rather than require full implementation of interconnection agreements.



It is "elementary" that statutes may not be interpreted in ways that "render one part inoperative." Colautti v. Franklin, 439 U.S. 379, 392 (1979); see, e.g., Gade v. National Solid Wastes Management Ass'n, 505 U.S. 88, 100 (1992); United States v. Menasche, 348 U.S. 528, 538-39 (1955). Under SBC's view, the inclusion of a separate Track B and in particular subsections (c)(1)(B)(i) and (ii) serves no purpose. That alone forecloses SBC's approach.

SBC also argues that Congress required the BOCs only to "provide access to network facilities and services under an interconnection agreement -- not necessarily the facilities and services themselves." SBC Br. 16 (emphasis in original). Of course, the Act refers not simply to "access" but to "access and interconnection," and the BOC's linguistic play on the meaning of "access" collapses when extended to "interconnection." It simply makes no sense to say that a BOC is required to provide "interconnection but not necessarily the facilities themselves needed for interconnection." And were an interconnection agreement all that was needed to satisfy Track A, neither the implementation-schedule exception to Track A nor the requirement that an agreement be "fully implemented" would be necessary.

SBC further asserts that "nonsensical consequences" would result if the BOC were required actually to provide all checklist items. Yet its purported concerns are makeweights. First, SBC suggests that providing all the items is not really important because the "more complete a competitor's network, the less it needs from the incumbent." SBC Br. 17. The Act was designed to foster competition under circumstances, however, where potential competitors do not have their own networks. Thus, Congress required BOCs to provide new entrants with the network elements and services that are essential to the development of local competition.

Second, SBC worries that "interexchange carriers . . . might be able to keep a Bell company out of the interLATA business simply by refusing to utilize a particular checklist service or feature." SBC Br. 17. But the fact is that AT&T and other potential competitors are actively seeking interconnection agreements to obtain all of the elements on the competitive checklist, each of which is essential to effective competitive entry in Oklahoma. Wren Aff. ¶ 11-13, 21. SBC therefore is not dependent upon the business plans of its future rivals. For example, if SBC, having first truly made available all checklist items, were ever able to show that interexchange carriers had "refus[ed] to utilize a particular service or feature" in order "to keep [SBC] out of the interLATA business," then its remedy would be to invoke the exceptions to Track A which trigger Track B.

Indeed, it is the consequences of SBC's interpretation that are nonsensical. For just as Track B responds to the BOC's concerns that potential competitors might not timely pursue local entry in good faith, so does the "is providing" requirement of Track A respond to the legitimate concerns of new entrants about the BOC's bad faith. In the absence of the incentive of obtaining interLATA authorization, there is demonstrated reason for concern that the BOCs in general, and SBC in particular, will find ways to avoid actually providing their competitors -- in a timely, nondiscriminatory manner -- what the Act requires. See Wren Aff. ¶¶ 17-50.

SBC's approach is thus unfairly and unlawfully one-sided. It preserves the protection that Track B gives SBC against CLECs' not following through on their agreements, but eliminates the protection that Track A gives CLECs against SBC not following through on its legal obligations. Given the BOCs' obvious incentives to prevent effective exchange competition and

SBC's conduct to date, it truly would be nonsensical to remove the protection of the "providing" requirement from Track A.

## **II. SBC MAY NOT RESORT TO TRACK B.**

Faced with the obvious deficiencies of its application under Track A, SBC attempts to invoke Track B. But under the plain terms of the statute, Track B is simply not available to SBC at this time, regardless of whether SBC's SGAT meets the statutory requirements. SBC's transparent goal is to exempt itself from the requirement of actually "providing" competitors with each of the checklist items. Because of the importance of the checklist items to the development of competition, SBC must not be excused from this statutory obligation except upon proof -- entirely lacking here -- that one of the statutory exceptions to Track A has been met.

Track B is available principally in the event that a BOC fails to receive a timely request for access and interconnection. § 271(c)(1)(B); see generally Section 252(a)(1) (describing process for "requesting" access and interconnection).<sup>6</sup> SBC has received multiple qualifying requests. For example, AT&T made its request to SBC for interconnection in Oklahoma on March 14, 1996. Turner Aff. ¶ 10 n.6. Other carriers, including Brooks Fiber, U.S. Long Distance (USLD), and Cox Communications Oklahoma City, Inc., also made requests prior to January 11, 1997, which is "the date which is 3 months before the date . . . [that SBC made]

---

<sup>6</sup> Track B is also available in the event that the BOC, having received a timely request, is nevertheless precluded through no fault of its own from complying with the "providing" requirement of Track A because of a CLEC's failure to negotiate in good faith or its violation of an implementation schedule. § 271(c)(1)(B). SBC has not asserted that either of these exceptions applies.

its application under subsection (d)(1)." Turner Aff. ¶ 10. As a result, SBC is foreclosed from invoking Track B.

SBC's principal contrary argument (Br. 14) is that Track B is foreclosed only by requests from carriers that are at least predominantly facilities-based at the time of their request for interconnection. In particular, SBC claims that the phrase "such provider" in § 271(c)(1)(B) refers to providers that qualify as predominantly facilities-based carriers for purposes of subparagraph (A).

First, the terms of subparagraph A foreclose SBC's reading. The phrase "such provider" in subparagraph (B) refers only to the "unaffiliated competing providers" in the first sentence of subparagraph (A), not to the "predominantly" or "exclusively" facilities-based providers referred to in the second sentence of subparagraph (A). SBC's contrary view simply ignores the express limiting language of Section 271(c)(1)(A). It is the second sentence of subparagraph (A) that contains the "at least predominantly facilities-based" requirement. What SBC overlooks is that the second sentence of subparagraph (A) itself uses the phrase "such competing providers" to refer back to the providers described in the first sentence of subparagraph (A).<sup>7</sup> Moreover, the second sentence begins with express language that *limits its applicability* to subparagraph (c)(1)(A): "For purposes of this subparagraph . . . ." § 271(c)(1)(A). SBC's interpretation --

---

<sup>7</sup> SBC's position thus ignores the parallel use of the phrase "such provider" in subparagraphs (c)(1)(A) and (c)(1)(B). The second sentence of subparagraph (A) uses the term "such competing providers" to refer back to the "unaffiliated competing providers" in the first sentence of subparagraph (A). In the same way, the reference to "such provider" in subparagraph (B) refers to the same "unaffiliated competing providers" in the first sentence of subparagraph (A). This reading is further confirmed by the immediately following reference in subparagraph (B) to "the access and interconnection described in subparagraph (A)," which is described once again in the first sentence of subparagraph (A).

which imports the "predominantly facilities-based" requirement into subparagraph (B) -- thus conflicts with the plain language of subparagraph (c)(1)(A).

Second, SBC's argument equally conflicts with the terms and obvious purpose of subparagraph (c)(1)(B). The terms of subparagraph (B) make it plain that Track B is triggered by a "failure to request access," not by the failure of facilities-based competition to develop prior to any request for access or interconnection. Indeed, it is illogical to suppose that such a competitor could exist prior to making a request, because even exclusively facilities-based competitors would need not only to request but also to obtain an interconnection agreement before they could become operational providers as required by subparagraph (A).

Further, there are several other reasons why the predominantly facilities-based requirement makes sense only when it is applied "for purposes of" subparagraph (A), as the statute states. For example, the predominantly facilities-based requirement could not meaningfully apply to subparagraph (B), for at the time a request for interconnection is made, there typically will be no way to be certain that a CLEC ultimately will provide service predominantly over its own facilities. SBC's reading also would have the perverse effect of permitting BOCs to proceed under Track B while simultaneously refusing to deal with numerous potential competitors seeking the access and interconnection that Congress intended them to obtain.

Third, SBC's reliance on the conference report is unavailing, because the report's reference to a "qualifying" provider could refer either to the first or the second sentence of subparagraph (A). The other legislative history on which SBC relies is the written comments of a single Congressman that addressed the earlier House version of the 1996 Act. Those

comments conflict with the Act's plain language, structure, and purpose, and have no probative value in any event.<sup>8</sup>

In all events, even accepting SBC's view that the only requests that count are those of predominantly facilities-based competitors, SBC still would not be entitled to invoke Track B.<sup>9</sup> For it is also SBC's view that carriers that serve subscribers using predominantly unbundled network elements are predominantly facilities-based for purposes of subparagraph (A). That being so, SBC cannot invoke Track B when SBC bears responsibility for the lack of any such facilities-based competition. Whatever else it may have intended, Congress certainly did not intend that a BOC's own determined resistance to providing unbundled network elements would enable that BOC to invoke Track B.<sup>10</sup>

---

<sup>8</sup> The comments of Rep. Tauzin (see 141 Cong. Rec. H8425, H8458, H8466 (daily ed. Aug 4, 1995), typeface indicates comments were written), are entitled even to less weight than comments from "floor debates" upon which the Supreme Court has "eschewed reliance." See Garcia v. United States, 469 U.S. 70, 76 (1984).

<sup>9</sup> Notably, SBC has received requests from, and signed agreements with, carriers (such as Brooks Fiber and USLD) that intend to provide services at least predominantly over their own facilities. See Turner Aff. ¶ 10 & n.9.

<sup>10</sup> SBC's alternative argument (Br. 15 n.15) is that the triggering date for the requests referred to in Track B is the date upon which CLEC became operational and therefore "qualified" as a facilities-based carrier. This argument is equally untenable. The date upon which a CLEC's operations begins is when the CLEC first receives access and interconnection; to receive access and interconnection on that date, the CLEC has necessarily "requested" it long before. The use of the term "requested" in subparagraph (c)(1)(B) is therefore plainly a reference to the "request" for access and interconnection provided for in Section 252. See, e.g., § 252(a)(1).

**III. SBC HAS NEITHER FULLY IMPLEMENTED THE COMPETITIVE CHECKLIST NOR MADE EACH ITEM GENERALLY AVAILABLE.**

Because SBC is independently barred from proceeding under either Track A or Track B, the Commission need not reach the question of SBC's compliance with the competitive checklist requirements of subsections 271(c)(2) and (d)(3). Nevertheless, it is appropriate to respond to SBC's assertions of checklist compliance, if only to show how extreme and unfounded they are. First, SBC is not close to demonstrating that it has fully implemented each item of the competitive checklist, which is the requirement of a Track A application. Such a demonstration would require proof that SBC is providing each element in a nondiscriminatory manner -- that is, on terms and conditions that are equal to what SBC enjoys, with certainty that SBC can provide each element in competitively significant volumes comparable to what it provides itself, and with proof that the quality of SBC's performance can be reliably measured and monitored. SBC concedes that it can make no such showing.

Second, SBC is equally far from showing that it has made each item generally available on a non-discriminatory basis, which is the requirement of a Track B application. That would require proof -- entirely missing in this record -- that SBC, pursuant to its SGAT, actually could and would timely furnish each checklist item in competitively significant volumes and in a nondiscriminatory manner when requested to do so. See page 12 & note 5 supra.

Most notably, SBC has neither provided nor offered (1) nondiscriminatory access to unbundled network elements; (2) cost-based prices for unbundled network elements; (3) nondiscriminatory access to its operations support systems; (4) nondiscriminatory resale; (5) interim number portability; or (6) numerous other checklist obligations. Each of these

omissions is an independent violation of SBC's statutory obligations, and further delays AT&T and others from bringing meaningful local competition to Oklahoma consumers.

**A. SBC Is Not Providing Or Offering Nondiscriminatory Access To Its Network Elements.**

Providing "[n]ondiscriminatory access to network elements" is one of SBC's most important obligations under the Act. See Sections 251(c)(3), 252(d)(2), 271(c)(2)(B)(ii), (iv)-(vi). Such "nondiscriminatory access" must both be "equal-in-quality to that which the incumbent LEC provides to itself," Local Competition Order ¶¶ 312-313, and allow the CLEC to "share[]" in the ILEC's "economies of density, connectivity, and scale." Id., ¶ 11. Moreover, such access must allow requesting carriers "to combine such elements in order to provide [any] telecommunications service" (§ 251(c)(3)), and "to use unbundled elements as they wish," in "any technically feasible manner," without having to use any of a carrier's own facilities. Local Competition Order ¶¶ 293, 340.

From the outset of its negotiations with SBC, AT&T has sought access to SBC's unbundled network elements (sometimes referred to as "UNEs") generally and in particular to a combination of elements that the parties refer to as the "platform." Wren Aff. ¶¶ 9-13; 16; 20. If the platform and its components were provided at cost-based rates and in a nondiscriminatory manner, AT&T could readily offer Oklahoma consumers a high quality, competitively priced alternative with features and options distinct from what SBC currently offers. Id. ¶ 13; see Falcone/Turner Aff. ¶¶ 16-18. SBC, no doubt fully aware of the competitive threat such UNE-based entry would create, has refused even to offer, let alone provide, either the platform or individual network elements on nondiscriminatory terms or at cost-based rates. In this regard, the only promise that SBC has fully implemented is to put out



for new entrants a "‘welcome mat smaller than anyone else’s.’" Wren Aff. ¶ 7 (citation omitted).

1. Design Services. SBC’s SGAT violates the nondiscrimination requirements of Section 251(c) and the Commission’s rules by treating orders for any unbundled network element as a request for "design services." Falcone/Turner Aff. ¶¶ 21-37. SBC’s design services require that the loop be temporarily disconnected so that a special "test point" can be placed on the line, which in turn enables the line to be tested manually rather than automatically. Id. ¶ 25. A "design services" approach serves no legitimate purpose for requests (like the platform) that combine an unbundled loop and an unbundled switch (id. ¶¶ 24-26), and the Commission’s rules (§ 51.315(b)) expressly prohibit LECs from "separat[ing] requested network elements that the incumbent LEC currently combines" in these ways. See Falcone/Turner Aff. ¶ 30.

Indeed, the design-services requirement is tailor-made to thwart competitive entry based on unbundled network elements. No competitor saddled with this requirement could offer a UNE-based service and compete. As Messrs. Falcone and Turner explain in detail, the design services requirement: (a) unnecessarily forces the customer to endure a service outage for 30 minutes; (b) serves as an excuse for SBC to impose exorbitant and wholly unjustified non-recurring charges; (c) permits SBC to bar CLECs from offering UNE-based service to the approximately 8 percent of all SBC customers currently served by IDLC loops; (d) results in markedly poorer quality service; and (e) is so labor-intensive that even a three-person team dedicated to such conversions full-time could handle no more than 40-50 conversions per day, thereby guaranteeing that no competitor could achieve a meaningful market presence through the